

EMMA A. O. BRUDEN, OR Bar # 163525
Kampmeier & Knutsen PLLC
P.O. Box 15099
Portland, Oregon 97293
Tel: (503) 719-5641
emma@kampmeierknutsen.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**NORTHWEST ENVIRONMENTAL
ADVOCATES**, an Oregon non-profit
corporation,

Plaintiff,

v.

**ANIMAL AND PLANT HEALTH
INSPECTION SERVICE**, an agency of the
United States of America,

Defendant.

Case No. 3:18-cv-1777

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(5 U.S.C. § 552)

(Freedom of Information Act)

INTRODUCTION

1. This is an action against the Animal and Plant Health Inspection Service (“APHIS”) for violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *as amended*. Under the judicial review provisions of both the FOIA and the Administrative

Procedure Act (“APA”), 5 U.S.C. §§ 701–706, Plaintiff Northwest Environmental Advocates (“NWEA”) seeks relief regarding a FOIA request it submitted to APHIS on March 16, 2018.

2. The purpose of the FOIA is “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” S. Rep. No. 89-813, 1st Sess., at 3 (1965). The FOIA therefore requires federal agencies to disclose records in a timely manner to any person upon request unless the information falls within one of nine narrow disclosure exemptions in the Act. *See* 5 U.S.C. § 552(a)(3)(A), (b).

3. Federal agencies generally must determine within twenty business days whether requested records are exempt from withholding and, if they are not, the agency must promptly disclose the records to the requester. 5 U.S.C. § 552(a)(6)(A)(i); *id.* at § 552(a)(3)(A), (a)(6)(C)(i). If an agency makes an adverse determination on a FOIA request, the requester may appeal that determination to the agency, which must then make a determination on the administrative appeal within twenty days of receiving it. *Id.* at § 552 (a)(6)(A)(i)(III)(aa), (a)(6)(A)(ii).

4. NWEA is filing this lawsuit because it has a need for the requested records and because APHIS has: (1) failed to make and communicate the agency’s final determination on NWEA’s FOIA request; (2) failed to make and communicate the disclosure determinations required by the FOIA for all responsive records in its possession; and (3) failed to act within applicable deadlines.

5. APHIS is unlawfully withholding its final determinations, as well as documents and information sought by NWEA, information to which NWEA is entitled and for which no valid disclosure exemption applies. NWEA therefore seeks a declaration that APHIS has violated the FOIA and an order of the court compelling APHIS to make the required determinations and

disclosures by a date certain.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. §§ 1331 (federal question), 1346 (United States as defendant), 2201 (declaratory judgment), and 2202 (further relief).

7. Venue is proper in the Portland Division of the United States District Court for the District of Oregon pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1391(e), and Local Rule 3-2(b) because NWEA resides and maintains its primary place of business in Portland, Oregon, and because a substantial part of the events or omissions giving rise to the claims occurred in this divisional venue and judicial district.

PARTIES

8. Plaintiff NORTHWEST ENVIRONMENTAL ADVOCATES is a non-profit entity organized under Section 501(c)(3) of the Internal Revenue Code, with its principal place of business in Portland, Oregon. Founded in 1969, NWEA has actively worked for over 30 years to protect and restore water quality and fish habitat in the Pacific Northwest. NWEA employs community organizing, strategic partnerships, public records requests, information sharing, advocacy with administrative agencies, lobbying, and litigation to ensure better implementation and enforcement of the laws that preserve the natural environment and protect water quality. NWEA also provides advice and information to many environmental organizations across the country. It has repeatedly proven itself a leader in protecting water quality and endangered aquatic species, and actively participates in many state and federal agency actions that affect water quality in the Pacific Northwest and across the nation.

9. NWEA and its members derive benefits from agencies' compliance with the FOIA and from its receipt of public records. In aid of its efforts to protect and restore the environment, NWEA regularly uses the FOIA to obtain records from federal agencies. NWEA requested the records sought in this action in support of these efforts and APHIS's failure to comply with the FOIA hinders NWEA's work.

10. The above-described interests of NWEA and its members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected by APHIS's disregard of its statutory duties under the FOIA and by the unlawful harm that results. APHIS's failure to fully implement the FOIA injures the interests of NWEA and its members and the relief requested in this lawsuit can redress these injuries. These harms are traceable to APHIS's conduct and would be remedied by the relief sought in this action.

11. Defendant ANIMAL AND PLANT HEALTH INSPECTION SERVICE is an administrative component of the United States Department of Agriculture. It is an agency of the executive branch of the United States government subject to the FOIA, pursuant to 5 U.S.C. § 552(f), and subject to the judicial review provisions of the APA, 5 U.S. C. §§ 701–702. APHIS is in possession or control of public records requested and sought by NWEA.

STATUTORY BACKGROUND

12. The purpose of the FOIA is “to open agency action to the light of public scrutiny.” *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). “Congress believed that this philosophy, put into practice, would help ‘ensure an informed citizenry, vital to the functioning of a democratic society.’” *U.S. DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

13. To achieve these important goals, the FOIA requires federal agencies to make records in their possession or control available to the public upon request, unless one of the FOIA's nine specific exemptions applies. 5 U.S.C. § 552(a), (b)(1)–(9). Additionally, to ensure a requester receives all requested documents, the FOIA requires agencies to conduct a search that is reasonably calculated to uncover all records responsive to the request. *Id.* § 552(a)(3)(C)–(D).

14. The FOIA imposes strict and rigorous deadlines on federal agencies. The FOIA requires a federal agency that receives a FOIA request to determine whether the requested records are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that determination to the requester within twenty business days. *Id.* § 552(a)(6)(A)(i). If the agency determines the requested records are exempt from public disclosure, the agency must also communicate to the requester that they have a right to appeal that determination. *Id.* If the agency determines the records are not exempt from public disclosure, the agency is required to make the requested records “promptly available” to the requester. *Id.* § 552(a)(3)(A), (a)(6)(C)(i).

15. Congress set forth the circumstances in which federal agencies may obtain more time to make the determination required by 5 U.S.C. § 552(a)(6)(A)(i). In two very limited circumstances an agency may toll the twenty-day deadline for making that determination. *Id.* § 552(a)(6)(A)(ii). Additionally, an agency may extend the twenty-day deadline for making that determination by providing a written notice to the requester that sets forth the “unusual circumstances” that justify the deadline extension and the date on which the agency expects to make the determination. *Id.* § 552(a)(6)(B)(i).

16. The statute includes a specific definition of the term “unusual circumstances.” *Id.* § 552(a)(6)(B)(iii). When the agency notifies a requester of unusual circumstances and the need for additional time, the agency's written notification “shall provide the person an opportunity to

limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii).

17. Unless an agency subject to the FOIA establishes a different timeline for disclosing responsive records by providing sufficient written notice of unusual circumstances, the FOIA’s mandate to make public records promptly available to a requester requires federal agencies to provide responsive records to a requester within or shortly after the twenty-day timeframe set forth in 5 U.S.C. § 552(a)(6)(A)(i).

18. If the agency fails to meet the disclosure deadlines established by the FOIA, including the deadline to determine within twenty days whether to respond to the request, the agency may not charge the requester for the costs incurred in searching for or duplicating the requested documents unless unusual or exceptional circumstances apply. *Id.* § 552(a)(4)(A)(viii). Even if unusual circumstances apply, the agency may not charge the requester for the costs incurred in searching for or duplicating the requested documents if the agency fails to comply with the extended time limit. *Id.* § 552(a)(4)(A)(viii)(II)(aa).

19. If an agency makes an adverse determination on a FOIA request, the requester may appeal that determination to the agency, which must then make a determination on the administrative appeal within twenty days of receiving it. *Id.* § 552(a)(6)(A)(i)(III)(aa), (a)(6)(A)(ii).

20. If the agency fails to make a determination on the FOIA request or the administrative appeal within the deadlines set forth in the FOIA, the requester is “deemed to have exhausted his administrative remedies” *Id.* § 552(a)(6)(C)(i).

21. A U.S. District Court has jurisdiction “to enjoin the agency from withholding

agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). If the government can show that “exceptional circumstances” exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. *Id.* § 552(a)(6)(C)(i). Notably, the term “exceptional circumstances” does *not* include a delay that results from a predictable agency workload of FOIA requests, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. *Id.* § 552(a)(6)(C)(ii). Refusal by a person to reasonably modify the scope of a request, or to arrange an alternative time frame for processing a request after being given an opportunity to do so by the agency, shall be considered as a factor in determining whether exceptional circumstances exist. *Id.* § 552(a)(6)(C)(iii).

22. Agency action under the FOIA is also subject to judicial review under the APA. *Or. Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (violation of the FOIA’s decision deadline constitutes agency action that is not in accordance with the law). Under the judicial review provisions of the APA, district courts are authorized to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). District courts must also set aside any agency action found to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or made without observation of required procedures. *Id.* § 706(2).

STATEMENT OF FACTS

23. On March 16, 2018, NWEA submitted a FOIA request for public records via electronic mail to the FOIA officer at APHIS in Riverdale, Maryland (hereinafter “FOIA request”). The FOIA request sought three categories of documents concerning APHIS’s beaver damage management program in Oregon, including records related to: (1) consultation under

Section 7 of the Endangered Species Act on APHIS Wildlife Service's direct management and/or funding of management of beavers in Oregon; (2) the cessation of trapping and/or killing of beavers in Oregon during the pendency of consultation; and (3) the result of direct management and/or funding of management of beavers in Oregon in 2017 and 2018. NWEA requested that APHIS consider the term "documents" to include, but not be limited to, letters, reports, memoranda, internal and external correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, summaries of conversations and interviews, computer records, and other forms of written communication. NWEA limited the request to only those documents prepared or utilized by, in the possession of, or routed through APHIS since January 16, 2017. NWEA's FOIA request also included a request for a fee waiver.

24. By letter dated March 23, 2018 and sent through electronic mail, APHIS acknowledged receipt of NWEA's FOIA request and assigned that FOIA request reference number 2018-APHIS-03058-F. APHIS stated that the target response date for NWEA's FOIA request was April 13, 2018.

25. Also by letter dated March 23, 2018 and sent through electronic mail, APHIS informed NWEA that it was seeking a 10-day extension in responding to NWEA's request.

26. By email dated April 2, 2018, APHIS requested clarification from NWEA about the scope of NWEA's request. APHIS inquired about the third category of requested records—the results of direct management and/or funding of management of beavers in Oregon in 2017 and 2018. APHIS referenced a previous FOIA request that NWEA submitted that also concerned APHIS's beaver damage management program in Oregon, and asked if NWEA would accept similar information that APHIS provided in response to the prior request.

27. By email dated April 6, 2018, NWEA explained that the FOIA request was

intentionally worded more broadly than the prior request and so NWEA expected APHIS to provide more information than the previous request.

28. APHIS did not respond to NWEA's FOIA request by April 13, 2018.

29. As of the date of this complaint, APHIS has not responded to NWEA's FOIA request.

30. NWEA has a need for the requested documents. APHIS kills hundreds of beavers in Oregon each year. In November 2017, NWEA sent APHIS a notice of intent to sue alleging the agency was in violation of the Endangered Species Act because beavers create habitat for threatened and endangered species, such as salmon, steelhead, and Oregon spotted frogs, and killing beavers harms those threatened and endangered species. APHIS responded to the notice letter by announcing a temporary end to the killing of beavers until the agency complies with the Endangered Species Act.

31. NWEA needs the information responsive to the FOIA request to ensure APHIS is not killing or harming beavers until it complies with the Endangered Species Act. The responsive information will help NWEA in its efforts to protect species only if NWEA receives the information in a timely manner.

32. As referenced above, this is not NWEA's first FOIA request to APHIS about the agency's beaver damage management program in Oregon. In 2017, NWEA submitted at least two FOIA requests to APHIS seeking information related to APHIS's consultation efforts under the Endangered Species Act for its beaver management program in Oregon and information related to the agency's killing and trapping efforts in Oregon from 2010 through 2016. After corresponding with the agency for a year, APHIS's continued delay forced NWEA to file a lawsuit in January 2018 to compel APHIS to disclose the documents NWEA sought. APHIS has

made and continues to make disclosures responsive to the 2017 FOIA requests on a monthly basis.

33. The deadline for APHIS to issue the final determinations required by 5 U.S.C. § 552(a)(6)(A)(i) for all records subject to the March 16, 2018 FOIA request has passed. As of the date this action was filed, APHIS had not provided NWEA with the determinations required by 5 U.S.C. § 552(a)(6)(A)(i) for all records subject to the FOIA request.

34. As of the date this action was filed, APHIS had failed to provide NWEA with all non-exempt documents that are responsive to NWEA's FOIA request.

35. As of the date this action was filed, APHIS had failed to make promptly available to NWEA all non-exempt documents that are responsive to NWEA's FOIA request.

36. APHIS is currently withholding from NWEA non-exempt documents that are responsive to NWEA's FOIA request. None of FOIA's nine exemptions to mandatory disclosure apply to the documents and information APHIS is currently withholding from NWEA. APHIS has no legal basis for withholding the records that NWEA sought via the FOIA request.

37. As of the date this action was filed, APHIS had constructively denied NWEA's FOIA request.

38. Prior to filing this action NWEA fully exhausted all administrative remedies required by the FOIA. 5 U.S.C. § 552(a)(6)(A), (a)(6)(C).

39. NWEA has been required to expend costs and to obtain the services of a law firm to prosecute this action.

40. The filing of this lawsuit was necessary to compel APHIS to make the determinations required by 5 U.S.C. § 552(a)(6)(A)(i) for all documents subject to NWEA's FOIA request.

41. The filing of this lawsuit was necessary to compel APHIS to disclose all non-exempt documents and information that are responsive to NWEA's FOIA request.

42. APHIS could have made the determinations required by 5 U.S.C. § 552(a)(6)(A)(i) for all records subject to the FOIA request before NWEA filed this lawsuit. APHIS could have disclosed all records responsive to NWEA's FOIA request before NWEA filed this lawsuit.

43. NWEA's claims for relief in this Complaint are not insubstantial. APHIS's failure to respond to NWEA's FOIA request is harming NWEA and hindering NWEA's conservation work.

44. No exceptional circumstances exist that would allow this Court to allow APHIS more time to review and disclose requested records. APHIS has not exercised due diligence in responding to NWEA's request. The delays at issue in this case result from a predictable agency workload of FOIA requests. APHIS has not made reasonable progress in reducing its backlog of pending requests.

45. The circumstances surrounding the withholdings raise questions regarding whether agency personnel acted arbitrarily or capriciously with respect to the withholdings at issue in this case.

46. Based on the nature of NWEA's professional activities, NWEA will continue to employ the FOIA's provisions in information requests to APHIS in the foreseeable future. NWEA's professional activities will be adversely affected if APHIS is allowed to continue violating the FOIA's disclosure provisions. Unless enjoined and made subject to a declaration of NWEA's legal rights by this Court, APHIS will continue to violate the rights of NWEA to receive public records under the FOIA.

CAUSES OF ACTION

CLAIM 1

VIOLATIONS OF THE FREEDOM OF INFORMATION ACT IN RESPONDING TO NWEA'S MARCH 16, 2018 FOIA REQUEST: VIOLATION OF THE DECISION DEADLINES IN THE FOIA

47. NWEA hereby incorporates by reference the allegations in the preceding paragraphs.

48. NWEA has a statutory right to have APHIS process its FOIA request in a manner that complies with the FOIA. APHIS violated NWEA's rights in this regard when APHIS unlawfully delayed its response to NWEA's March 16, 2018 FOIA request beyond the deadlines imposed by the FOIA.

49. APHIS violated and is violating the FOIA by failing to make a decision to disclose or withhold documents and information subject to NWEA's FOIA request by the deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i).

50. APHIS violated and is violating the FOIA by failing to make the records subject to NWEA's FOIA request promptly available to NWEA.

51. Each and every allegation in this claim is a separate violation of the FOIA for which this Court can provide relief to NWEA under the FOIA.

52. APHIS's violations of the FOIA with respect to its response to NWEA's FOIA request entitle NWEA to an award of reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E).

CLAIM 2

VIOLATION OF THE FREEDOM OF INFORMATION ACT: UNLAWFUL CONSTRUCTIVE DENIAL/UNLAWFUL WITHHOLDING

53. NWEA hereby incorporates by reference the allegations in the preceding

paragraphs.

54. NWEA has a statutory right to the records it seeks. There is no legal basis for APHIS to assert that any of the FOIA's nine disclosure exemptions apply to the records APHIS has that are responsive to NWEA's FOIA request.

55. APHIS has violated and is violating NWEA's rights by unlawfully withholding non-exempt documents and information responsive to NWEA's FOIA request. APHIS's actions in response to NWEA's FOIA request constitute a constructive and unlawful denial of NWEA's FOIA request.

56. APHIS's violations of the FOIA with respect to its response to NWEA's FOIA request entitle NWEA to an award of reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E).

CLAIM 3

(In the alternative to Claims 1 and 2)

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT: FAILURE TO COMPLY WITH THE FOIA IN RESPONDING TO NWEA'S FOIA REQUEST

57. NWEA hereby incorporates by reference the allegations in the preceding paragraphs.

58. APHIS violated the FOIA by, at a minimum: (a) failing to make the determinations for all documents and information subject to NWEA's FOIA request as required by 5 U.S.C. § 552(a)(6)(A)(i); and (b) failing to disclose, and to disclose promptly, all non-exempt documents and information subject to NWEA's FOIA request.

59. Each and every allegation in this claim four is a separate violation of the FOIA for which this Court can provide relief to NWEA under the APA. Making the determinations

required by 5 U.S.C. § 552(a)(6)(A)(i) for all documents and information subject to the FOIA request and making responsive documents available, and promptly available, to NWEA are final agency actions unlawfully withheld or unreasonably delayed that this Court can compel under the APA, 5 U.S.C. § 706(1).

60. Alternatively, APHIS's decisions not to make the determinations required by 5 U.S.C. § 552(a)(6)(A)(i) and not to make responsive documents promptly available to NWEA are final agency actions that are arbitrary, capricious, an abuse of discretion, not based on substantial evidence in the record, not in accordance with the law, or otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things those actions do not comply with the FOIA or APHIS's regulations or policies.

61. NWEA is entitled to relief under the APA and to costs of litigation and reasonable attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

PRAYER FOR RELIEF

WHEREFORE, NWEA respectfully requests that the Court:

A. Adjudge and declare that APHIS has violated the FOIA for the reasons set forth above;

B. Order APHIS to comply immediately with the FOIA by providing NWEA with the required determinations and all non-exempt public records subject to NWEA's March 16, 2018 FOIA request;

C. Declare that NWEA is the prevailing party and/or substantially prevailing party in this matter; that the position of the government in this action was not substantially justified; and that there are no special circumstances that make an award of costs and reasonable attorneys' fees to NWEA unjust;

D. Award NWEA its reasonable attorneys' fees and litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) and/or award NWEA its reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412;

E. Grant NWEA such additional relief as the Court may deem just and proper.

DATED this 5th day of October 2018.

Respectfully submitted,

s/ Emma Bruden
Emma A. O. Bruden, OR Bar # 163525
Kampmeier & Knutsen PLLC
P.O. Box 15099
Portland, Oregon 97293
Tel: (503) 719-5641
emma@kampmeierknutsen.com

Attorneys for Plaintiff